BRUNEI REPORT

INDUSTRIAL RESOURCES SDN. BHD. v. AWANG TAHIR BIN HAJI HAMZAH

[A.C.J. (Sears J.) 16 September 1987]

[Bandar Seri Begawan – Civil Appeal No. 14 of 1987]

Hire Purchase – Motor car hire purchase agreement – Hirer defaulted on instalments and hire purchase company repossessed the car – Duty of company to mitigate their loss – Where burden of proof lies – Standard of conduct as to what are reasonable steps.

In May 1987, the plaintiffs hired a motorcar to the defendant with a cash price of $12,000; the defendant used it for eight months and accumulated 17,675 kilometres. He defaulted on his instalments; the car was repossessed and the plaintiffs sold it to a motorcar company for $5,500. The magistrate held that the plaintiffs had not proved that they had acted reasonably in the mitigation of their loss. The plaintiffs appealed.

Held, allowing the appeal: (1) in law, the burden of proof was on the defendant to satisfy the court that the plaintiffs had not acted reasonably. The learned magistrate has misplaced the onus of proof onto the plaintiffs.

(2) by putting a notice in their premises inviting offers for the car and selling to the motor trade, the plaintiffs had acted reasonably in their efforts to mitigate their loss.

Cases referred to:

(1) *Banco De Portugal* v. *Waterlow* [1932] A.C. 452 (apprvd).

(2) *Garnac Grain Co.* v. *Faure & Fairclough* [1968] A.C. 1130 (apprvd).

CIVIL APPEAL.

Beh Lip Leng for the appellant.

Respondent absent.

Cur. Adv. Vult.

Sears J.: This is an appeal against the decision of the magistrate of this court. It arises out of a claim made by the plaintiffs, a hire-purchase company.

On 29 May 1984, they entered into a hire-purchase agreement with the defendant for a motorcar and the total cash price of the motorcar was $12,000. The defendant used the car for some eight months or so and managed to accumulate 17,675 kilometres in that short period of time. The defendant defaulted on his instalments and the hire-purchase company repossessed the motor car. They, as is their normal practice, put a notice of advertisement in their shop window inviting offers and they obtained an offer from another motorcar company that deals in secondhand cars, Grand Motor Company, and they sold it for $5,500.

When the matter came before the learned magistrate, he started off his judgment by saying, "It is the burden of the plaintiffs to prove their claim on a balance of probability. It is also the duty of the plaintiffs to take reasonable steps to mitigate their losses, in this case to get the best market price possible."

In my judgment, there is an error of law in the reasoning behind those opening sentences.

First, it must always be remembered that in this type of action, the wrongdoer was the hirer under the hire-purchase agreement. It was he who brought the contract to an end and there is a line of authorities on the standard of conduct which a plaintiff, when dealing with such a wrongdoer, must attain when one has to assess what reasonable steps he should take to mitigate his loss. The leading case in the House of Lords in England is *Banco De Portugal* v. *Waterlow*.(1)

The authorities all show that the plaintiff must act reasonably and that the standard of reasonableness is not high. All the plaintiff has to do is to do what would be normal in his normal course of business. I can see nothing wrong in what the plaintiffs have done in putting a notice in their premises inviting offers for the car and selling to the motor trade.

Secondly, the learned magistrate has also misplaced the onus of proof. It is clear from his judgment that he was putting the onus of proof on the plaintiffs to prove that they had mitigated their loss in a reasonable manner.

In my judgment, that is an error of law. The onus of proof on the issue of mitigation is on the defendant. That has been the settled law for over a hundred years and was confirmed in *Garnac Grain Co.* v. *Faure & Fairclough*.(2) The learned magistrate, therefore, has erred in two respects in law on this matter; the defendant did not prove on the evidence that was before the magistrate that the plaintiffs had failed to act reasonably.

In my judgment, the evidence is all one way and it is quite clear that the plaintiffs did act reasonably.

The judgment, therefore, has been flawed by those two errors of law. I therefore would allow this appeal and enter judgment for the plaintiffs for the amount they have claimed with interest at the appropriate rate and the plaintiffs to have their costs of this appeal and before the magistrate.

Appeal allowed.

Solicitors: *Susanna Lim and Co.*

A MALAYSIAN REPORTS

HEE NYUK FOOK v. PUBLIC PROSECUTOR

[S.C. (Seah, Hashim Yeop A. Sani & Syed Agil Barakbah S.C.JJ.) 7 March & 28 May 1988]

B **[Kuala Lumpur – Supreme Court Criminal Reference No. 1 of 1988]**

Criminal Procedure – Charge – Amendment of – During the course of trial – Whether it is mandatory to read and explain amended charge – Failure to do so – Whether curable – Criminal Procedure Code (FMS Cap. 6), ss. 156, 158(ii), 167, 168, 173(h), (i) & (j) & 422.

C In this case, the applicant had been charged with the offence of cheating under section 420 of the Penal Code, *viz.* by dishonestly inducing one Wong Won Chong to deliver to the applicant cash of $40,000 for the purchase of a stolen Mercedes Benz motor car. During the course of the trial in the Sessions Court, the charge was amended twice. D The first amendment made at the close of the prosecution case related to the particulars of the amount involved, from cash of $40,000 to $37,000. The amended charge was read over to the applicant but not explained to him. The second amendment was made after the close of the defence and submissions by the defence counsel and the prosecution. The charge was amended to include the words "cash E cheque No. 271784 for a sum of $37,000". The amended charge was neither read nor explained to the applicant. The applicant was found guilty, convicted and sentenced. His appeal to the High Court was dismissed. The applicant was then granted leave to refer the following questions of law of public interest to the Supreme Court:

F (a) Where in the course of trial a charge is amended, is it mandatory to read and explain the amended charge to an accused person pursuant to the provision of section 158(ii) of the Criminal Procedure Code.

(b) If the answer to (a) is in the affirmative, then is the omission to read and explain the amended charge to an accused person a mere irregularity which can be cured G by recourse to section 422 of the Criminal Procedure Code.

Held: (1) the question whether section 158(ii) of the Criminal Procedure Code is mandatory or directory depends on the facts and circumstances of a particular case, the purpose and object for which such provision is made, H the intention of the legislature in making the provision and the serious inconvenience or injustice which may result in treating the provision one way or the other. No hard and fast rule can be laid down merely from the use of the word "shall" therein;

(2) applying the test to the facts and surrounding circumstances of the case, the provision of section 158(ii) of I the Criminal Procedure Code, in so far as this case is concerned, is not imperative but directory. The provisions contained therein only lay down a rule of procedure and do not relate to the mode of the trial. *A fortiori* in the light of the provision of section 422 of the Code;

(3) the nature of the amendment being purely technical and in no way substantial has not rendered the omission